

1972

The Rogue v. The Utah Liquor Control Commission of the State of Utah And Sharp M. Larsen, F. Gerald Irvine, And Norma Giles Thomas, : Appellant's Brief

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SUPREME COURT

STATE OF UTAH

THE REGUE, a non-profit corporation,

Petitioner

THE UTAH COMMISSION OF UTAH ANTI-SMOKING SOCIETY, a non-profit corporation,
Respondent

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Salt Lake City, Utah 84114
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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THE ROGUE, a non-profit Corporation,

Petitioner and Appellant,

vs.

THE UTAH LIQUOR CONTROL
COMMISSION OF THE STATE
OF UTAH AND SHARP M. LARSEN,
F. GERALD IRVINE, AND
NORMA GILES THOMAS, Con-
stituting the members of said Com-
mission,

Respondents.

Case No.

200930

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

This is an action in mandamus to compel the Liquor Control Commission of Utah to issue Appellant's liquor license upon a finding that Appellant complies with the liquor laws of the State of Utah.

DISPOSITION OF CASE IN LOWER COURT

The District Court denied Appellant's Writ of Mandamus and dismissed the case with prejudice.

NATURE OF RELIEF SOUGHT ON APPEAL

Appellant seeks to have this Court order the Lower Court to issue a Writ of Mandamus compelling the Liquor Control Commission of Utah to grant Appellant's liquor license in the absence of a finding that Appellant has substantially failed to comply with any of the statutory requirements prescribed in the Utah Liquor Control Act and the Utah Non-Profit Corporation Act for the obtaining of said license.

STATEMENT OF FACTS

The Appellant, The Rogue, is a private non-profit club organized under the laws of the State of Utah and presently has a valid license issued by Salt Lake County for the serving of mixers to be used with alcoholic beverages. Appellant also has a Class C beer license. Pursuant to the requirements of Salt Lake County in the early part of 1971 Appellant made application to the Salt Lake County Planning Commission for a conditional use permit to enable Appellant to establish a State Liquor Store on its premises and to maintain private lockers for the storage of liquor. Thereafter the County Planning Commission staff made an in-depth study and analysis and recommended to the Salt Lake Planning Commission that Appellant's application be approved.

After several public hearings with the Planning Commission and the County Commission, in which several members of the neighborhood were present and fully presented their objections to Appellant's application, the

Appellant was granted the Conditional Use Permit by the Salt Lake County Commission. In granting the Appellant's conditional use permit, the County Commission determined that the Petitioner's use met all of the requirements specified in the county ordinances for granting of conditional use applications to wit:

“(a) That the use is not in the immediate proximity of any school, church, library, public playground or park.

(b) That the proposed use at a particular location is *necessary and desirable* to provide said service or facility which will *contribute to the general well being* of the neighborhood and the community; and

(c) That *such use will not, under the circumstances of the particular case be detrimental to the health, safety or general welfare of persons residing or working in the vicinity, or injurious to property or improvements in the vicinity*; and

(d) That the proposed use will comply with regulations and conditions specified in this title for such use, and

(e) That the proposed use will conform to the intent of the Salt Lake County Master Plan.” (Salt Lake County Revised Ordinances, Section 22-31-4(1).) (Emphasis added.)

After receiving the approval of the local authority, Appellant made application to the Liquor Control Com-

mission of Utah for a license to maintain lockers for storage of liquor on its premises and for the establishment of a State Liquor Store thereon. The Liquor Control Commission subsequently scheduled a meeting on the Appellant's application and invited several representatives of the neighborhood to attend the meeting. At the meeting the neighborhood objections which had been thoroughly discussed and resolved at the County Commission hearing and at the Planning Commission meetings were again reviewed by the Liquor Control Commission. In light of the neighborhood opposition to the granting of the license the Liquor Commission continued the matter for one month and scheduled a second meeting on Appellant's application.

At the second meeting, which was held on July 15, 1971, the Liquor Control Commission again heard the objections of the neighborhood and in light of the same, denied Appellant's application. Thereafter Appellant appealed to the Liquor Control Commission to reconsider the denial and the Liquor Control Commission subsequently on August 9th, 1971, again denied Appellant's application.

The Liquor Commission's denial of Appellant's application was based solely upon their opinion that the proposed use was "incompatible with the neighborhood." Appellant contends that the Liquor Control Commission of Utah exceeded its statutory authority by becoming involved in zoning matters and further contends that the

Liquor Commission's denial is arbitrary and capricious and without foundation in the law.

ARGUMENT

POINT I.

THE UTAH LIQUOR CONTROL ACT SPECIFICALLY DELEGATES ZONING CONSIDERATIONS PERTAINING TO THE LOCATION OF STATE LIQUOR STORES TO THE LOCAL AUTHORITIES.

The Utah Liquor Control Act originally provided that the Utah Liquor Control Commission had ultimate authority to:

Decide within the limits and under the conditions imposed by this Act, the number and locations of the stores and package agencies to be established in this State. Utah Code Annotated Sec. 32-1-6 (b).

The extent of the Liquor Control Commission's authority under this former section was defined in *In Re Salt Lake County vs. Liquor Control Commission*, 11 Utah 2d 235, 337 P. 2d 488 (1960). In that case the Utah Supreme Court determined that the local county arm of the State sovereign must yield to the State wide arm (the Liquor Commission) and further that the Liquor Control Commission had the authority to locate liquor stores anywhere in the State in spite of conflicting county zoning ordinances.

The effect of the above decision was to bestow on the Liquor Control Commission ultimate authority to locate liquor stores in its discretion without regard to local zoning laws. In essence, the authority to determine zoning considerations regarding the placement of liquor stores was taken from the local authorities and vested in the Liquor Control Commission.

In the light of the above interpretation of the Liquor Control Act, in 1966 the Utah Legislature revised Section 32-1-6(b) as follows:

(b) Decide within the limits and under the conditions imposed by this Act, the number and location of the stores and package agencies to be established in the State; *provided that a State Store or package agency shall not be located in violation of any valid zoning ordinance of any city, town or county of this State.* Zoning ordinances which do not make provision for the location of state stores and package agencies in one or more zones, shall be deemed invalid for purposes of this section. (Emphasis added.)

The obvious intention of the legislature in adding the 1966 proviso is to return the complete authority for zoning to the local authorities. The proviso clearly states that the Liquor Control Commission is no longer vested with the power to override or violate local zoning laws. When the Salt Lake County Commission determined that the Appellant's proposed use:

(a) at the particular location is necessary and desirable, and will contribute to the general well being of the neighborhood, and

(b) will not, under the circumstances of the particular case be detrimental to the health, safety or general welfare of persons residing or working in the vicinity (Salt Lake County Revised Ordinances Sec. 22-31-4(1).)

that matter was finally determined and in the absence of an appeal to the District Court and a finding therein that the County exceeded its authority or acted arbitrarily or capriciously, that decision must stand (Salt Lake County Revised Ordinances Section 22-31-4).

If the Liquor Control Commission is allowed to reopen the matter of "neighborhood compatibility" which is purely a zoning issue, the clear meaning of the 1966 Amendment is violated and the Commission has reinstated itself as a super zoning commission with power to ignore and override the county zoning commission's decisions.

This is directly opposed to the Legislature's clearly manifested intent in passing the 1966 amendment to Section 31-1-6(b) and will result in a fatal weakening of the county's zoning authority with respect to liquor store placement. It further violates the well recognized principle that apportionment of distinct power to one department of government implies inhibition against its exercise by other departments thereof. This principle was clearly articulated by the Utah Supreme Court in *Kimball vs. Grantsville City*, 19 Utah 368, 57 P. 1.

The 1966 proviso is obviously necessary in light of the Liquor Control Commission's obvious lack of staff and ex-

expertise in deciding zoning matters. Zoning laws cannot be systematically developed without substantial detailed analysis and study. This function has been given by statute to County Planning and zoning staffs who are constantly studying and planning development of the county. The absurdity of allowing the Liquor Control Commission to override these rigorous zoning plans was readily apparent to the Legislature, and resulted in the Legislature's decision to return zoning matters to the local authorities with regard to the placement of liquor stores.

POINT II.

THE LIQUOR CONTROL COMMISSION'S AUTHORITY TO GRANT LICENSES TO PRIVATE NON-PROFIT CLUBS IS SPECIFICALLY CONTROLLED BY THE PROVISIONS OF THE NON-PROFIT CORPORATION ACT (Utah Code Annotated 16-6-13 et seq. as amended).

An administrative agency, such as the Liquor Control Commission is a creation of the Legislature and possesses only those powers specifically given it by statute. The Utah Non-Profit Corporation Act as contained in Utah Code Annotated Sections 16-6-13 et seq. (as amended), specifically governs the granting of liquor licenses and the establishment of State Liquor Stores in non-profit clubs. The provisions of this act specifically govern the granting of Appellant's license, and the specific provisions in the Non-Profit Corporation Act control

the general terms of the Utah Liquor Control Act under the doctrine of *ejusdem generis*.

The Utah Code Annotated 1953 (as amended) prescribes the following scheme for private non-profit clubs to obtain a license permitting storing of alcoholic beverages and the establishment of a State Liquor Store on the premises:

Applicants must first obtain a bond in the amount of \$7,500 (Sections 16-6-13.1(1), and submit a copy of their Articles, Bylaws and House Rules to the Utah Liquor Control Commission (sections 16-6-13.1(1). If a state store is desired by the applicant, it must file a written application with the Commission accompanied with a \$25.00 filing fee, have the written consent of the local authority, show satisfactory evidence that it serves a variety of hot food. The applicant must further show compliance with the Utah Liquor Control Act of 1969, and submit a floor plan of the establishment (Sec. 16-6-13.1). (Emphasis added.)

Unlike the Utah Liquor Control Act which grants broad discretion to the Liquor Control Commission in locating public liquor stores and package agencies, the Non-Profit Corporation Act strictly defines the grounds upon which a non-profit private club's application may be denied. Utah Code Annotated 1953 (as amended) Section 16-6-13.1(7) provides:

The Utah Liquor Control Commission may refuse to locate a State Liquor Store in any social club, recreation, athletic, or other kindred association whose officer, director, managing agent or employee has been convicted of a felony or of viola-

tion of any ordinance, state or federal law concerning the sale, delivery, or transportation of an alcoholic beverage, or who forfeited bond to appear in court to answer charges of having committed a felony or having violated any such laws or ordinances, or has pleaded guilty to a charge of having committed a felony, or has violated any such law or ordinance, or who has been convicted of any crime involving moral turpitude.

Additional grounds for denial are provided as follows:

1. Section 16-6-13.6 . . . “except that no license shall be issued to any club or association which established or intends to establish such premises in immediate proximity of any existing school, church, library, public playground or park.”
2. Section 16-6-13.6(3) “. . . The Commission may refuse to grant a license to any applicant whose officer, director, managing agent or employee has been convicted of a felony or violation of any state or federal law or city or county ordinance, concerning the sale, delivery, or transportation of alcoholic beverages, or who has forfeited a bond to appear in court and answer charges of having committed a felony or violated any such laws or ordinances, or who has pleaded guilty to a charge of having committed a felony, or of having violated any such laws or ordinances, or who has been convicted of any crime involving moral turpitude, or who was a partner, managing agent, officer or director of any Utah non-profit corporation whose charter has been involuntarily revoked under the provisions of this Act for violation of any provision of the Utah Liquor Control Act or regulations adopted thereunder.”

3. Section 16-6-13.6(4) "A license shall not be granted nor permitted to continue in force with respect to any applicant which is or becomes or whose officer, director, managing agent or employee is or becomes subject to payment of a tax pursuant to the provisions of Subchapter A of Chapter 35, Federal Internal Revenue Code, dealing with "Tax on Wagers" as presently enacted."

4. Section 16-6-13.6(5) (f) . . . "The Commission may refuse to issue a license if it deems that any provisions (for visitors and the use of guest cards) are not reasonable and consistent with the declared nature and purpose of the applicant and the purpose of this Act . . ."

Clearly the Legislature did not intend to give the Liquor Control Commission unlimited authority to deny liquor licenses to private non-profit clubs. If this broad discretionary authority had been intended, the Legislature could have merely stated that the Liquor Control Commission has authority to deny such application for any reason it deems appropriate. However, in light of the Legislature's decision that the local authority should consider the zoning matters, it is clear that these matters are not to be considered by the Liquor Control Commission. The fact that the Legislature specifically set forth the grounds for denial is a clear indication that the Commission was not to have unlimited authority therein. The Commission is directed by the Legislature to consider specific items and to grant the license if the applicants comply therewith. In the present case, Appellant was told by the Commission that a determination of their compliance under the provisions of the Non-Profit Cor-

poration Act had not even been made because, in the Commission's opinion, the Appellant's use was incompatible with the neighborhood. This decision clearly violates the law in that the Commission has failed to perform its statutory duties in considering Appellant's application in light of the law.

Furthermore, no authority is given to the Commission in the Non-Profit Corporation Act to deny applications on the basis that it considers the use to be incompatible in the neighborhood. The Legislature was specific in stating that the Commission's only neighborhood inquiry is to determine whether the applicant club was in the immediate proximity to any school, church, library, public playground or park. No authority is given to determine other "neighborhood compatibility," and the Liquor Commission's consideration of this issue is totally without foundation in the law.

POINT III.

ARTICLE V OF THE CONSTITUTION OF UTAH PROHIBITS THE LEGISLATURE FROM EMPOWERING ADMINISTRATIVE AGENCIES TO EXERCISE ARBITRARY DISCRETION IN GRANTING OR REFUSING LICENSES.

It is a well settled point of law that the Legislature may not delegate its legislative powers. *Young vs. Salt Lake City*, 24 Utah 321, 67 P. 1066. However this principle does not prohibit the creation of administrative

agencies and the delegation of fact finding duties to such agencies. When this is done, however, it is equally clear that such agencies must be provided with a sufficient test or standard for their guidance. *State vs. Goss*, 79 Utah 559, 11 P. 2d 340. [See also *Carter vs. Beaver County Service Area No. One*, 16 Utah 2d 280, 399 P. 2d 440 (1965).] The Legislature may not, empower administrative agencies to exercise arbitrary discretion in granting or refusing licenses, but must prescribe a sufficient test or standard for their guidance. (See 73 C. J. S. Sec. 33 (b).) As stated by the Utah Supreme Court, in *Revne vs. Trade Commission*, 113 Utah 155, 192 P. 2d 563, the question of improper delegation of Legislative authority lies embedded in the extent of power granted to the administrative body.

Respondent asserts that it possesses full authority to consider all facts it deems appropriate in considering appellant's liquor license. Indeed such broad, arbitrary authority cannot be and was not delegated to the Liquor Control Commission by the Legislature in the provisions of the Utah Non-Profit Corporation Act, *supra*. On the contrary, the act sets forth specific guide lines and standards for the liquor control commission to follow and directs the commission to consider specific facts regarding the applicants. (See Point II, *supra* for a discussion of these specific items.) There is a complete absence of any provisions purporting to grant broad discretionary authority to the Liquor Control Commission, and in light of the foregoing authority the presence of such broad pro-

visions would render the Statute unconstitutional and void.

It is therefore clear that the Legislature has properly delegated to the Liquor Control Commission specific standards and guide lines to be considered in granting liquor licenses to private, non-profit corporations. That notwithstanding, the Liquor Control Commission, by denying applicant's application on the basis of neighborhood incompatibility, has ignored those guide lines and has usurped the Legislature's discretionary authority by considering the issue of neighborhood incompatibility. This latter issue has specifically been given by statute to the local authorities who in turn have been given guide lines to follow in making their zoning determinations. If the Liquor Control Commission is allowed to consider these zoning issues without any guide lines from the Legislature pertaining thereto, they are clearly violating well established constitutional prohibitions restricting administrative agencies from having general discretionary powers without the requisite standards.

It is therefore abundantly clear that the Liquor Control Commission of Utah does not and cannot possess the broad, discretionary power it purports to possess. If the delegation of legislative authority is to be upheld, the Liquor Control Commission must be required to operate within the standards and guide lines established by the Legislature. The Liquor Control Commission's exercise of broad, discretionary zoning powers is therefore clearly unconstitutional and the Liquor Control Commission is

assuming a greater authority than the Legislature could constitutionally delegate to it.

POINT IV.

THE LIQUOR CONTROL COMMISSION'S DENIAL FAILS TO CORRECT THE ALLEGED NEIGHBORHOOD PROBLEMS AND IN FACT IS DETRIMENTAL TO THE NEIGHBORHOOD.

The Liquor Control Commission denied Appellant's application because in its opinion the Appellant's use of the particular location was incompatible with the neighborhood. However, this denial is totally ineffective in prohibiting the Appellant from operating a private club in the neighborhood. The law clearly provides that the existence or non-existence of private non-profit clubs is controlled by the local authorities. Hence, the Liquor Control Commission's denial of Appellant's application does not prohibit Appellant's club from continuing to operate in the neighborhood. In fact, a private club has been operated on the premises now occupied by Appellant for the past 9 years and Appellant can continue to operate its private club indefinitely with a license from Salt Lake County allowing the consumption of alcohol thereon. This can be done in spite of the Liquor Commission's determination that consumption of alcohol on the premises is incompatible with the neighborhood. Therefore, the Liquor Commission's denial of Appellant's application has no practical effect except to eliminate the consump-

tion of liquor on Appellant's premises. Appellant's club members can continue to carry their own liquor into Appellant's premises and consume it thereon and Appellant can continue to serve mixers for the consumption of alcohol and can continue to sell draft beer on the premises. It is absurd to assert that the Legislature intended the Liquor Control Commission to become involved in making determinations which it has no power to enforce. Here again the wisdom of the Legislative scheme is apparent. The local authority has full power to decide the location of private, non-profit clubs and is further vested with the authority to remove private clubs when it finds that they are incompatible with the neighborhood, County Master Plan, etc. or when they become a public nuisance.

Furthermore, the Liquor Control Commission's denial of the Appellant's application was in fact a *detriment* to the neighborhood because it denied the neighborhood the benefit of several improvements which were required by the local authority. Salt Lake County, in connection with the granting the Conditional Use Permit to Appellant, imposed the following requirements upon the Appellant:

- (1) A six-foot high solid visual barrier masonry wall or wood fence is to be installed along the north and east property lines;
- (2) Five percent landscaping is to be provided in the parking area to meet with parking ordinance requirements;
- (3) Sidewalk is to be installed along 4300 West and curb, gutter and sidewalk along 3500 South;

(4) A seven-foot strip for the widening of 3500 South was dedicated to Salt Lake County;

(5) Lighting is to be added in the parking lot and building so that it would not reflect on adjoining residential property;

(6) That subject to approval by the State an opening onto the parking lot will be made on 3500 South.

The Appellant has agreed to comply with all of the above conditions which are contingent upon the final granting of the liquor license by the Liquor Control Commission.

It is clear that the consequences of the Liquor Control Commission's denial are twofold. One, the Appellant is not by any means deprived of his right to continue the operation of its non-profit private club in the neighborhood so the neighbors receive no benefit as result of the Liquor Control Commission's denial. Two, the improvements to the Appellant's premises which were required by Salt Lake County in connection with the Conditional Use Permit need not be completed.

It is abundantly clear from the above that the Liquor Control Commission's denial based solely on zoning issues is without foundation in the law and is totally ineffective in accomplishing the objective of the Liquor Control Commission.

CONCLUSION

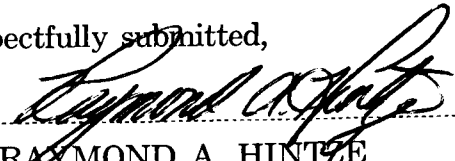
The Legislature of the State of Utah has enacted an orderly method for the granting of liquor licenses in the

State of Utah. This procedure recognizes the expertise of the local authorities in zoning and creates a Liquor Control Commission to enforce liquor laws. The statutory scheme for the granting of licenses requires applicants to first obtain zoning approval from local authorities. The application is then presented to the Liquor Control Commission for determination of compliance with the State Liquor Laws. The duties of each of the foregoing arms of the State Government, *to wit*, the local authorities and the Liquor Control Commission, are specifically outlined by statute and each have separate and distinct functions and duties to perform which are set forth by the Legislature.

The Appellant contends that the Liquor Control Commission, by becoming involved in zoning issues has usurped authority specifically given to the local authorities and has violated the aforesaid legislative scheme.

Appellant therefore respectfully requests that this Court issue an order compelling the Lower Court to issue a Writ of Mandamus requiring the Liquor Control Commission of Utah to comply with the provisions of the Utah Liquor Control Act and the Non-Profit Corporation Act and to grant the Appellant the requested licenses contingent upon the Appellant's compliance with the aforesaid laws.

Respectfully submitted,


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